

The Honorable Richard A. Jones
The Honorable J. Richard Creature

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE**

EL PAPEL, LLC, et al.,

Plaintiffs,

V.

JENNY DURKAN, et al.,

Defendants.

NO. 2:20-cv-01323-RAJ-JRC

DEFENDANT ROBERT W,
FERGUSON'S OBJECTIONS TO
REPORT AND
RECOMMENDATION

NOTE ON MOTION CALENDAR
October 15, 2021

OBJECTIONS

Defendant Attorney General Robert W. Ferguson respectfully submits two objections to the Report and Recommendation entered on September 15, 2021. Dkt. #141.

First, the Report and Recommendation addressed the merits of Plaintiffs' claims because "plaintiffs are claiming nominal damages and declaratory relief." Dkt. #141 at 13. But for the reasons injunctive relief against the State is moot, so too is Plaintiffs' claim for declaratory relief. See Dkt. #104 at pp. 21–22; Dkt. #121 at pp. 11–12. This is because a claim for declaratory relief seeks to determine the legal rights and obligations of the parties with prospective effect. Because it is prospective, such a claim may be mooted by changed circumstances, like changes in a defendant's policies that "make it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 170 (2000). By contrast, a claim for retrospective relief, like a claim for

1 nominal damages, is unaffected by such a change in circumstances. The State Moratorium ended
 2 on June 30, 2021, mooted Plaintiffs' requests for both injunctive *and* declaratory relief. *See*
 3 Engrossed Second Substitute S.B. 5160, 67th Leg., Reg. Sess. (Wash. 2021), *enacted as* 2021
 4 Wash. Sess. Laws, ch. 115; Proclamation 20-19.6.

5 Second, the Report and Recommendation “assumes that the State’s restriction
 6 substantially impaired the contractual relationship.” Dkt. #141 at p 14. While this assumption
 7 does not amount to a factual finding or conclusion of law, in an abundance of caution, Attorney
 8 General Ferguson objects to it to preserve any future argument that the State Moratorium did not
 9 substantially impair contractual relationships for the reasons stated in the State’s cross-motion
 10 for summary judgment. *See* Dkt. #104 at pp. 23–29; *see also* Dkt. #121 at pp. 13–15.

11 DATED this 27th day of September, 2021.

12 ROBERT W. FERGUSON
 13 Attorney General

14 /s/ Cristina Sepe
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20 *Attorneys for Defendant Robert W. Ferguson,*
 21 *in his official capacity as Attorney General*
of the State of Washington

1 **DECLARATION OF SERVICE**

2 I hereby declare that on this day I caused the foregoing document to be electronically
3 filed with the Clerk of the Court using the Court's CM/ECF System which will send notification
4 of such filing to all counsel of record.

5 DATED this 27th day of September 2021, at Tacoma, Washington.

6 _____
7 */s/ Cristina Sepe*
CRISTINA SEPE, WSBA #53609
8 Assistant Attorney General

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